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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

DEAN A. PHELPS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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March 19, 1985

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Circuit erred by finding consent to a warrantless search where the majority misquoted the significant words which purportedly constituted "clear and positive" consent and the correct words were ambiguous and unclear.

2. Whether State law officers may forcibly impound and search a rental automobile from lessees where there were no reasonable grounds to believe that a crime had been or was being committed.

3. Whether an appellate-defendant is denied the effective assistance of retained counsel under the Sixth Amendment to the Constitution of the United States where retained counsel (a) failed to inform his client that counsel had been indicted for a felony drug offense during the pendency of the appeal; and (b) counsel failed to transmit the entire relevant record from the United States District Court to the Sixth Circuit Court of Appeals.

TABLE OF CONTENTS

page

Questions Presented For Review 1

Opinion Below 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT:

1) The majority decision below is founded on an inaccurate quotation from the Record which was so central to the determination of consent by the Sixth Circuit that the Petitioner was prejudiced 5

2) The decision below has decided an important question of federal law which has not been, but should be, settled by this Court, and in so deciding has extended the power of a state law enforcement officer to impound and effectuate a warrantless search of a leased automobile in violation of the Fourth Amendment 6

3) The ineffective assistance of the retained counsel so undermined the proper functioning of the appellate process that the Defendant was deprived of a fair hearing on appeal 9

CONCLUSION 11

Certificate of Service 12

Appendix A
Order of United States Court of Appeals for the Sixth Circuit, filed January 4, 1985 ..... 1a

Appendix B
Order of United States Court of Appeals for the Sixth Circuit, filed October 1, 1984 ..... 2a

page

Appendix C
Opinion of United States Court of Appeals for the Sixth Circuit, filed September 11, 1984 ..... 3a-7a

Appendix D
Opinion of United States District Court, Eastern District of Kentucky, filed October 13, 1983 ..... 8a-14a

Appendix E
Order of United States District Court, Eastern District of Kentucky, filed August 25, 1983 ..... 15a-17a

Appendix F
Magistrate's Report and Recommendation 18a-23a

Appendix G
Order Withholding Adjudication of Guilt and Placing Defendant on Probation 24a-27a

TABLE OF AUTHORITIES

page

Cases:

Amos v. *United States*, 255 U.S. 313 (1921) 5

Bumper v. *North Carolina*, 391 U.S. 543 (1968) 5

Carroll v. *United States*, 267 U.S. 132 (1925) 6

Evitts v. *Lucey*, 53 U.S.L.W. 4101 (No. 83-1378, decided January 21, 1985) 9

Florida v. *Royer*, 460 U.S. 491 (1983) 5, 10

Johnson v. *United States*, 333 U.S. 10 (1948)..... 5

Katz v. *United States*, 389 U.S. 347 (1967) 9

Lo-Ji Sales, Inc. v. *New York*, 442 U.S. 319 (1979)..... 5

Preston v. *United States*, 376 U.S. 364 (1964) 6

Ross v. *United States*, 456 U.S. 798 (1982)..... 6

Schneckloth v. *Bustamante*, 412 U.S. 218 (1973) 5, 8

South Dakota v. *Opperman*, 428 U.S. 364 (1976)..... 6

Strickland v. *Washington*, 466 U.S. ____ (1984) 9

United States v. *Place*, 103 S.Ct. 2637 (1983).....7, 8, 10

Wagner v. *Commonwealth*, 581 S.W.2d 352 (Ky. 1979) 7, 8

Federal Rules of Procedure:

Rule 30, Federal Rules of Appellate Procedure 10

Rule 11, Rules of the Sixth Circuit 10

Other Authorities:

Practitioner's Handbook for Appeals to the United States Court of Appeals for the Sixth Circuit (Rev. 1981)..... 11

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No. _____

DEAN A. PHELPS,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Dean A. Phelps, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 11, 1984.

OPINION BELOW

The opinion of the Court of Appeals, and the Order denying Rehearing, not reported, appear in the Appendix hereto. An opinion as to evidentiary matters, a Report and Recommendation of the Magistrate, and an Order as to Fourth Amendment Suppression issue of the United States District Court, Eastern District of Kentucky at Covington, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 11, 1984. A timely Petition for a Rehearing/Suggestion of a Rehearing En Banc was denied on January 4, 1985, and this Petition for Certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the Constitution of the United States

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Sixth Amendment to the Constitution of the United States

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

On January 25, 1983, two Kentucky State policemen became mildly suspicious of a male white and male black in a car with Florida license plates who had parked and entered a house trailer. The officers investigated through radio transmissions and discovered that the car was owned by Budget Rent-A-Car of Florida. They knocked on the door of the mobile home and were invited in by Petitioner Dean A. Phelps.

The officers discovered that possession was authorized, but that the car was three (3) days overdue and was not to be driven outside of the State of Florida. The officers called Budget who told them that Budget wanted the car returned.

Over the next one-and-a-half hours, after being joined by a third Kentucky policeman, the officers manned the phones in an attempt to decide whether grounds existed to arrest the suspects or impound the car. Although the officers stayed with the suspects for the entire one-and-a-half hours in the house trailer, gave them *Miranda* rights and took over the telephones, they told the suspects that they were not under arrest or suspected of any crimes.

After receiving a call from the Commonwealth Attorney's Office, the officers formally told Phelps that the car was to be forcibly impounded. One officer asked Phelps if there was anything in the trunk. Phelps replied, "No". The officer told him, "You should be sure," and Phelps handed or tossed him the keys. The officer opened the trunk, saw several boxes and noticed the odor of marijuana. The officers then continued the search by opening boxes and found marijuana and cocaine.

After a Motion to Suppress was denied, Petitioner Phelps and Co-Defendant Chauncey Taylor were convicted by a jury on a two-count indictment for possession of controlled substances with intent to distribute on August 30, 1983. On November 2, 1983, Petitioner Phelps was adjudged guilty and sentenced to two years in a federal penal institution. On November 4, 1983, a timely Notice of Appeal was filed in the United States District Court for the Eastern District of Ken-

tucky appealing the conviction of Phelps to the United States Court of Appeals for the Sixth Circuit.

On December 6, 1983, Mr. Ed Leinster, Attorney at Law, entered his appearance as counsel in the Sixth Circuit. On March 19, 1984, Appellant Phelps' brief was filed with the Sixth Circuit. On March 21, 1984, Ed Leinster was charged with possession of cocaine and resisting an officer with violence. App. P. 24a. Subsequently, on April 26, 1984, Mr. Leinster appeared for oral argument before a panel of the Sixth Circuit on behalf of Petitioner Phelps. On September 4, 1984, Mr. Leinster pleaded guilty to possession of cocaine, a third-degree felony. App., P. 25a.

On September 11, 1984, the United States Court of Appeals for the Sixth Circuit filed an Opinion affirming the conviction of Phelps.

On October 1, 1984, the Sixth Circuit granted the Motion of Phelps to remove Attorney Leinster as counsel. On October 25, 1984, after an extension of time had been granted, Phelps filed a Petition for a Rehearing/Suggestion of a Rehearing En Banc which was denied on January 4, 1985.

REASONS FOR GRANTING THE WRIT

1. The majority decision below is founded on an inaccurate quotation from the Record which was so central to the determination of consent by the Sixth Circuit that the Petitioner was prejudiced.

There is one aspect of the rapidly changing area of search and seizure jurisprudence that has not undergone substantive changes in analysis in recent years. Consent to a warrantless search of the personal property of a private citizen by police must be clear, positive and unambiguous and not a mere submission to a claim of lawful authority. *Florida* v. *Royer*, 460 U.S. 491 (1983); *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979); *Schneckloth* v. *Bustamante*, 412 U.S. 218 (1973); *Bumper* v. *North Carolina*, 391 U.S. 543 (1968); *Johnson* v. *United States*, 333 U.S. 10 (1948); *Amos* v. *United States*, 255 U.S. 313 (1921).

Here, when the officer obtained the keys to the car and trunk from Phelps, a claim of lawful authority had already been asserted to impound the car. "Impoundment" is "to take into the custody of the law or a court." *Black's Law Dictionary*, P. 889 1968 Edition). It was only after the coercive authority of the State was expressly made clear to Phelps that he gave the officer the keys. App., P. 20a.

Thus, the question that must be considered is the reasonableness of searching the trunk under these circumstances. The majority in the Sixth Circuit determined that Phelps consented to the search. App. P. 3a. While consent is determined by the totality of the circumstances, *Schneckloth*, 412 U.S. 218, 227 (1973), a critical circumstance surely is the dialogue immediately preceding the search.

The Sixth Circuit decision recited that Phelps consented when the officer told him that he should look in the trunk to see if anything remained. According to the majority decision, Phelps replied, "It should be *done*," and tossed the officer the keys. App., P. 4a. (Emphasis added).

One might agree that a clear and positive consent occurred if this dialogue actually was presented by the record. The

problem, as noted by Judge Jones in his concurring decision (which is supported by a review of the record), is that the quotation recited by the majority is manufactured. In truth, Phelps said no such thing and allowing this decision to stand would cast considerable doubt on the integrity of our judicial process.

Therefore, the Writ of Certiorari must be granted to review the clearly erroneous decision of the Sixth Circuit.

2. The decision below has decided an important question of federal law which has not been, but should be, settled by this Court, and in so deciding has extended the power of a state law enforcement officer to impound and effectuate a warrantless search of a leased automobile in violation of the Fourth Amendment.

In its decision, the Sixth Circuit assumed that the officers had a right to impound the car. The car was impounded pursuant to a request by Budget Rent-A-Car of Florida who owned the car. However, at the time that the car was impounded, the officers had satisfied themselves that Petitioner Phelps and Co-Defendant Taylor had merely breached the rental contract and were not under arrest. App., P. 9a.

Clearly, the appropriate and constitutional action of the officers would have been to request that Phelps return the car to the closest Budget Rent-A-Car office rather than impound and search it. Both the Opinions of the Sixth Circuit and the Federal District Court indicate that Phelps was extremely cooperative with the officers during the entire one-and-a-half hour encounter.

In virtually every case finding an impoundment of an automobile lawful, it has followed the arrest of the occupant (or the owner of an unoccupied vehicle). *Ross* v. *United States*, 456 U.S. 798 (1982); *South Dakota* v. *Opperman*, 428 U.S. 364 (1976); *Preston* v. *United States*, 376 U.S. 364 (1964); *Carroll* v. *United States*, 267 U.S. 132 (1925). Furthermore, the warrantless searches of the automobiles in the

above-mentioned cases were either pursuant to the arrest or for the purpose of an inventory.[1]

Because Phelps and Co-Defendant Taylor were not arrested prior to the impoundment of the automobile and there was no refusal on their part to return the automobile to Budget Rent-A-Car, the sole possible rationale for impounding the car was the request of Budget. Therefore, at the time they impounded the car, the officers had become repossession agents of Budget Rent-A-Car in a contract dispute between the lessor and the lessee of a leased automobile. As the concurring Opinion of Circuit Judge Nathaniel Jones concedes, "This case involves police intrusion into what was essentially a civil matter." App., P. 6a.

As a recent decision of this Court has made clear, seizures of property are governed by the same general principles as searches and are per se unreasonable unless accomplished pursuant to a Warrant or a recognized exception to the Warrant requirement of the Fourth Amendment. *United States* v. *Place*, 103 S.Ct. 2637 (1983). Here, as in *Place*, the police conduct exceeded the permissible limits of a brief seizure for investigative purposes when the officers, without suspicion of criminal activity, informed Petitioner Phelps that they were forcibly impounding the car.

In order to justify the impoundment, the record should show that Petitioner Phelps refused to return the car on his own volition to Budget Rent-A-Car. The Record is clear that no such opportunity was given to Phelps by the officers. Even assuming that Phelps, as lessee, refused to concede that Budget had the greater present right to the automobile and refused to reconvey the automobile voluntarily, one fails to understand the use of public treasury funds for impoundment of the vehicle when the car was unoccupied and certainly amenable to repossession by Budget.

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[1] Inventory searches are not constitutionally permitted in Kentucky unless expressly requested by the owner. *Wagner* v. *Commonwealth*, 581 S.W.2d 352 (Ky., 1979).

Thus, under the Fourth Amendment standards recently enunciated in *United States* v. *Place*, 103 S.Ct. 2637 (1983), the seizure of the automobile by impoundment was constitutionally improper and, in itself, should render the ensuing search constitutionally impermissible.

The search of the automobile followed the oral assertion by police that the automobile was to be forcibly impounded, but preceded the actual physical impoundment. At that point, the officer obtained the keys from Phelps and opened the trunk. The Sixth Circuit found consent, which is a legitimate and recognized exception to the Warrant requirement of the Fourth Amendment. *Schneckloth* v. *Bustamante*, 412 U.S. 218 (1973). However, the citation of Phelps' words of consent were misquoted and the correct language is not the "clear and positive" language that is required by the Constitution. *Schneckloth*, 412 U.S. 218, 248 (1973).

The concurring Opinion of Judge Jones in the Sixth Circuit Opinion asserted that Phelps had abandoned his interest in the trunk of the automobile when he gave the officer the keys. There was no question or dispute that Phelps did not relinquish the keys until the police had asserted the intention to impound the car. "Impoundment" is to "take into the custody of the law or of a court." *Black's Law Dictionary*, P. 889 (1968 Edition).

To accept the proposition that Phelps abandoned his interest in the trunk of the automobile under these circumstances would so broaden the definition of abandonment that it would virtually include every transfer of property from a citizen to law enforcement officers. Nor was the search of the trunk of this automobile an inventory of a lawfully impounded automobile. Even assuming a lawful impoundment, the law enforcement officials were acting under color of Kentucky law during this encounter and knew that under the Kentucky Constitution, there can be no inventory of the contents of an impounded automobile unless the owner *requests* such inventory to protect his personal effects. (Emphasis added). *Wagner* v. *Commonwealth*, 581 S.W.2d 352 (Ky., 1979).

There certainly can be no dispute that the opening of the

trunk of the automobile was a search which is per se unreasonable without a search warrant. *Katz* v. *United States*, 389 U.S. 347 (1967). Although several theories have been advanced by the United States and the District and Appellate Courts, no exception can be shown to be reasonable under these circumstances. Even assuming that Budget Rent-A-Car had a right to impound the overdue automobile, certainly the officers could not constitutionally search the trunk without a search warrant or an exception to the Warrant requirement. Law enforcement should not be utilized by private citizens to remedy a civil breach of a contract unless such a remedy has been enacted by the relevant legislature. This is certainly an instance where the goal of deterring police misconduct can be achieved by excluding wrongfully obtained evidence.

Therefore, the Sixth Circuit Court erred in affirming the determination of the District Court that the evidence need not be suppressed.

3. The ineffective assistance of the retained appellate counsel so undermined the proper functioning of the appellate process that the Defendant was deprived of a fair hearing on appeal.

This Court has recently recognized the right of a criminal defendant to the effective assistance of counsel on his first appeal of right. *Evitts* v. *Lucey*, 53 U.S.L.W. 4101 (No. 83-1378 decided January 21, 1985). The Sixth Amendment to the Constitution of the United States, according to *Lucey*, makes no distinction between appointed and retained counsel. Further, the effectiveness of counsel is to be judged by the same criteria as the effectiveness of counsel at trial.

In *Strickland* v. *Washington*, 466 U.S. ____ (1984), this Court stated the proposition that effective assistance of counsel must be determined considering all of the circumstances. Defendant must show first, counsel's performance was deficient and second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial.

In this appeal, Petitioner Phelps was represented by Mr. Ed Leinster. According to the scheduling order of the Court, Petitioner Phelps' brief was due on March 19, 1984. Mr. Leinster also was obligated to insure that the entire relevant record be transmitted from the District Court to the Sixth Circuit Court, prepare with the assistance of the United States Attorney the joint appendix under Rule 30 of the Federal Rules of Appellate Procedure and Rule 11 of the Rules of the Sixth Circuit, read and reply to the brief of the United States, and prepare and argue at oral argument before a three-judge panel of the Sixth Circuit.

Mr. Leinster did write a brief and a response brief and filed a joint appendix containing several parts of the record of the District Court. Mr. Leinster failed to transmit several dispatch tapes which had been entered into evidence at the Suppression Hearing in the District Court containing the actual background of the police investigation into the events which led to the arrest of Petitioner Phelps. Mr. Leinster's failure to include the dispatch tapes deprived the Court of the most reliable evidence and prejudiced Phelps.

Mr. Leinster filed a brief and response brief which do describe and delineate some of the issues here involved. However, several United States Supreme Court cases which should control and were not cited by Mr. Leinster are *Florida* v. *Royer*, 460 U.S. 491 (1983) and *United States* v. *Place*, 1983 S.Ct. 2637 (1983). In *Royer* this Court held that a detained suspect cannot voluntarily consent to a search under coercive circumstances. In *Place*, this Court held that seizures are governed by the same Fourth Amendment principles as searches in analysis of the constitutionality of a seizure of property by law enforcement officers.

The lack of strong advocacy on the part of Mr. Leinster can be explained by his own personal problems occurring at the time he was prosecuting this appeal on behalf of Petitioner Phelps.

While the argument could be advanced that the obtaining by Mr. Phelps of the undersigned counsel to file a Petition for a Rehearing cured any ineffectiveness of Mr. Leinster, it must

be considered that Petitions for Rehearing are rarely granted and are considered by the judges without oral argument. See *Practitioner's Handbook for Appeals to the United States Court of Appeals for the Sixth Circuit.* (As revised 1981), P. 48. As a practical matter, the opportunity to correct the mistakes of Mr. Leinster on the Petition for a Rehearing did not afford Petitioner Phelps the full guarantee of the Sixth Amendment to the Constitution of the United States.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and Opinion of the Sixth Circuit.

Respectfully submitted,

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Counsel for Petitioner

March 19, 1985

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. _____

DEAN A. PHELPS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 1985, three copies of the Petition for a Writ of Certiorari were mailed to the Solicitor General of the United States, Department of Justice, 10th and Pennsylvania Avenue, Room 5143, Washington, D.C. 20530; and one copy was mailed, postage prepaid, to James Arehart, Assistant United States Attorney, P.O.Box 1490, Lexington, Kentucky 40588, counsel for the United States. I further certify that all parties required to be served have been served.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-5830

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DEAN ALLEN PHELPS,
Defendant-Appellant.

ORDER

(Filed January 4, 1985)

BEFORE: MERRITT, JONES and WELLFORD, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-5830

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DEAN A. PHELPS,
Defendant-Appellant.

ORDER

(Filed October 1, 1984)

Upon consideration of the appellant's motion for leave to withdraw Ed Leinster as counsel for the appellant in this appeal and to substitute Bruce Whitman as counsel for the appellant,

It is ORDERED that the motion be and it hereby is granted and Bruce Whitman shall be substituted as counsel for the appellant on this appeal.

ENTERED PURSUANT TO RULE 4(f),
RULES OF THE SIXTH CIRCUIT.
John P. Hehman, Clerk

/s/ LEONARD GREEN
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 83-5830
83-5859

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DEAN ALLEN PHELPS (83-5830),
CHAUNCEY TAYLOR (83-5859),
Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Kentucky

(Filed September 11, 1984)

Before: MERRITT, JONES and WELLFORD, Circuit Judges.

MERRITT, Circuit Judge. The issue in this appeal is whether the search of defendant's rental car violated the Fourth Amendment prohibition against unreasonable searches and seizures. The resolution of this issue turns upon whether defendants consented to the search under the particular facts of the case. An examination of the record compels the conclusion that defendants did consent to the search. We therefore affirm their convictions.

I.

Captain Robert Collins of the Kenton County, Kentucky, Sheriff's Department observed defendants' rental car in a parking lot outside a trailer park where he was waiting to

serve a warrant in an unrelated case. He later testified that the license plate appeared to have been altered, which prompted him to run a license check on the car. The check revealed that the car was owned by Budget Rent-A-Car in Florida, that it had not been returned in compliance with the rental contract, and that it had not been driven solely within Florida as the contract stipulated. An agent with the company then filed a complaint with the Orlando Police Department requesting that the Kenton County police impound the car.

Captain Collins returned to the trailer park and asked defendant Phelps if he could talk to him about the car. Phelps invited Collins and another officer into the trailer, where Collins advised defendants of their *Miranda* rights and told them that Budget wanted the car back. He told them they were not under arrest. In response, Phelps indicated that the rental contract had been extended. Phelps and Captain Collins then telephoned a Budget representative, who advised them that the contract had not been extended and that the company wanted the car returned.

At that point, defendant and Captain Collins went to the car where defendants retrieved personal belongings from the passenger compartment and defendant Taylor transferred them, unaccompanied, to the trailer. Captain Collins' partner, Chuck Webster, asked Phelps if there were anything else in the car or the trunk, to which Phelps replied, "No." Webster told him, "You ought to be sure," and Phelps handed or tossed him the keys, stating, "It should be done." Webster opened the trunk and immediately recognized the distinct oder of marijuana emanating from eight cellophane-wrapped boxes. In addition, there was a leather travel case containing a powdery substance later identified as cocaine.

Defendants were found guilty of possession of marijuana and cocaine with intent to distribute in violation of 21 U.S.C. § 871(a)(1) (1982). Defendants unsuccessfully moved to suppress the cocaine and marijuana discovered in the search and argue in this direct criminal appeal that the District Court erred in denying their motion to suppress.

II.

The Fourth Amendment protects against unreasonable searches and seizures. A warrantless search is "*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions," *Katz* v. *United States*, 389 U.S. 347, 357 (1967), including consent. *Davis* v. *United States*, 328 U.S. 582 (1946). When the subject of a search is not in custody and the state attempts to justify a search on the basis of consent, the Fourth Amendment requires that the state demonstrate that the consent was "in fact voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth* v. *Bustamante*, 412 U.S. 218, 248 (1973).

Defendants' argument that the search of the trunk violated the Fourth Amendment centers around their theory that Budget had no standing to consent to the search of the car, in which defendants had a legitimate expectation of privacy. Further, defendants argue that they did not consent to the search because they were "seized" inasmuch as the police exercised a significant restraint on their freedom.

We do not disagree with the finding of the District Court that the defendants voluntarily consented to the search. The defendants invited the police officers into the trailer, and were advised more than once that they were not under arrest. The officers waited while defendants telephoned Budget in an attempt to show that they were legitimately in possession of the car. When this failed, the defendants clearly agreed to gather their belongings from the car and gave the key to the officer voluntarily when the officer suggested that defendants check the trunk to make sure they had left nothing behind.

Although it is settled that consent to a warrantless search must be "clear and positive," and not simply acquiescence to apparent police authority, *e.g.*, *Schneckloth*, 412 U.S. 218, it is clear that it was defendant Phelps, not Budget, who consented to the search, and that his consent was voluntary and uncoerced. The defendants now argue that it was "rather foolish" for Phelps to have voluntarily consented to the search of the trunk. Nevertheless, it appears from the record that that is precisely what he did. As the Supreme Court com-

mented in *United States* v. *Mendenhall*, 446 U.S. 554, 555-56 (1980): "It may happen that a person makes statements to law enforcement officials that he later regrets, but the issue in such cases is not whether the statement was self-protective, but rather whether it was made voluntarily."

We conclude that the District Court did not err in finding that this search was conducted pursuant to valid, voluntary consent.[1] Accordingly, we affirm defendants' convictions.

JONES, Circuit Judge, concurring. I concur with the majority's conclusion that there has been no Fourth Amendment violation in this case. I am unable to agree with their underlying rationale for that conclusion. There is no indication that the defendants consented to the search of the car. As the majority acknowledges, consent to a warrantless search must be clear and positive, and not simply acquiescence ot apparent police authority. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248 (1973). The majority found that consent was given because Phelps handed or tossed the keys to Chief Webster and stated "it should be done." There is no indication in the record that Phelps ever stated "it should be done." The testimony simply indicates that Phelps tossed Chief Webster the keys after Webster said that the trunk of the car should be checked. In other words, Phelps simply complied with the Chief's request. It should be kept in mind that these were uniformed officers who spent almost an hour with the defendants. The defendants were not in a position to disobey or ignore the officers' request. Since the defendants did not give clear and positive consent to the search, the majority's reasoning is erroneous.

This case involves police intrusion into what was essentially a civil matter. At the time the police entered the trailer, the

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[1] In view of our disposition of this case on the basis of finding voluntary consent to the opening of the trunk, we do not find it necessary to determine whether, as concluded by the trial judge, defendants retained no privacy interest in the articles in the trunk at the time of the discovery of the contraband.

only information they had was that the rental car was overdue. The defendants' breach of their contract with Budget Rent-a-Car did not constitute a criminal offense. The police officers, therefore, were operating on the fringe of the law when they entered the trailer and also when they searched the car. Nevertheless, there was no Fourth Amendment violation in this case because the defendants abandoned any interest they had in the items in the car when they stated that they had removed their belongings and that nothing further remained in the car.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CRIMINAL NO. 83-30

UNITED STATES OF AMERICA
PLAINTIFF

VS.

DEAN ALLEN PHELPS
and CHAUNCEY TAYLOR
DEFENDANTS

OPINION

(Filed October 13, 1983)

Bertelsman, District Judge:

This memorandum is written to explain certain evidentiary rulings made by the court during the trial of the above case.

The case arises out of the prosecution of the defendants for willful possession of 169 pounds of marijuana and a pound and-a-half of cocaine with intent to distribute, which conduct is prohibited by 21 U.S.C. § 841(a)(1) A brief recitation of the facts is necessary so that the reader may place the rulings of the court in context.

Certain officers of the Kenton County, Kentucky, Sheriff's Department and Dixie Police Authority were conducting a stakeout in the hope of serving some warrants. The stakeout was in a mobile home park in Kenton County, Kentucky. The officers observed the defendants enter the mobile home park in a Lincoln Continental automobile. After behaving suspiciously, the defendants parked the car and went into one

of the mobile homes. Subsequent observation and investigation by the officers revealed that the automobile bore a Florida license plate, which a radio inquiry revealed was registered to Budget Rent-a-Car.

Certain communications back and forth between the officers and the officials of Budget in Florida resulted in the officers' ascertaining that the automobile was two days overdue and under its rental contract should not have been driven outsid of Florida. After several telephone calls over a period of an hour-and-a-half to two hours, Budget instructed the officers to take the car into their possession and return it to Budget.

The officers then knocked on the door of the mobile home, which the defendants had entered and told the defendants that Budget had instructed the officers to repossess the automobile, because it was overdue.

Further conversations and delay ensued while the defendants attempted to contact Budget to procure an extension on the rental contract. These efforts proved unsuccessful and the officers informed defendants that, although they were not under arrest, and the officers were not treating this car as a stolen vehicle, they were going to take it into their possession upon the instructions of Budget, its owner.

The officers then requested the defendants to remove any personal belongings of theirs from the automobile. In the process of accomplishing this, the illicit drugs were discovered in the trunk of the vehicle. There were several large bales of marijuana, the nature of which was obvious upon the officers' opening the trunk. In addition, more than a pound of cocaine was found in a satchel or gym bag, also located in the trunk.

It is at this point that the events occurred which gave rise to the rulings discussed in this opinion.

At a bench conference, counsel for defendant Phelps advised the court that he was going to seek to introduce through the testimony of one of the officers, that, when the officers discovered the cocaine in the gym bag, Phelps had stated, "That is my gym bag, but Taylor put it in the trunk."

The unusual feature concerning the introduction of this statement was that the statement was sought to be introduced

by Phelps himself and the objection to the testimony was made, not by the United States, but by the co-defendant Taylor.

The stated ground of the objection was that it constituted hearsay and would violate Taylor's rights under the confrontation clause, the court having been advised that Phelps did not intend to take the stand on his own behalf.

Phelps' response to these objections was that the matter constituted an admission or came under the present sense exception of F.R.Ev. 803(1), or the excited utterance exception of F.R..Ev. 803(2). That these were well recognized hearsay exceptions was sufficient, Phelps argued, to satisfy the confrontation clause. *See Ohio* v. *Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 2539 (1980).

Analysis of the situation revealed that the proffered testimony was indeed hearsay and that neither of the two exceptions mentioned above were applicable. Therefore, it was not necessary to consider the confrontation problem, since the testimony was not admissible.

Although the proponent of the testimony was the declarant himself, the testimony constituted hearsay under F.R.Ev. 801, which states in part:

> "(c) **Hearsay.** 'Hearsay' is a statement, other than one made by the declarant *while testifying at the trial or hearing,* offered in evidence to prove the truth of the matter asserted." (Emphasis added.)

Although the defendant-declarant was present in the courtroom, he was not on the stand testifying as to the statement, and the proffered declaration was therefore an out-of-court statement subject to a hearsay objection.

Further, it is equally clear that the statement was not excluded from the definition of hearsay by the fact that it was an admission. F.R.Ev. 801 provides concerning admissions:

> " **(d) Statements which are not hearsay.** A statement is not hearsay if
>
> * * *

> "(2) **Admission by party-opponent.** The statement is offered *against a party* and is (A) his own statement, in either his individual or a representative capacity . . ." (Emphasis added).

The statement of a party may be introduced as an admission only when offered *against* that party. *See U.S.* v. *Sanders*, 639 F.2d. 268 (5th Cir. 1981); *Auto-Owners Insurance Company* v. *Jensen*, 667 F.2d 714, 722 (8th Cir. 1981). This principle is reflected by the standard but often unanalyzed objection that such testimony by a party constitutes a "self-serving declaration." 6 J. Wigmore, *Evidence* § 1732 (1976). Some confusion arises by reason of the fact that, to be admissible, a party's out-of-court statement need not have been against his interest when made. But it may not be offered in his *favor*, but only *against* him. *Auto-Owners Insurance Company* v. *Jensen, supra.*

It was necessary then to turn to the two hearsay exceptions relied on by the proponent. Even a cursory reading of F.R.Ev. 803(1) shows it is not applicable.

> **"Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial**
>
> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> "(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

The proffered statement could not be considered a present sense impression under Rule 803(1), because the subject matter of the statement offered was not what the declarant was presently perceiving when the statement was made, but rather something which had occurred at a remote previous time, namely whenever the gym bag was placed in the trunk. The primary guaranty of trustworthiness underlying this exception is the "substantial contemporaneity" of event and

statement. Therefore, "it should be noted that the exception is limited to statements made while an event or condition is perceived or immediately thereafter. The theory of the Rule will not support a substantial time interval between event and statement." S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 574 (3d ed. 1982). This substantial contemproaneity is lacking here.

The argument based on the excited utterance exception presented a more difficult problem. F.R.Ev. 803(2) defines excited utterances thus:

> "(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

The court, however, concluded that that exception was not applicable, for the following reasons.

The court, as is the recommended procedure, conducted a hearing out of the presence of the jury as to the qualification of the statement as an excited utterance, pursuant to F.R.Ev. 104(a). 4 Louisell & Mueller, *Federal Evidence* § 439, at 509 (1980).

The factor of trustworthiness underlying the excited utterance exception is spontaneity. *See* S. Saltzburg & Redden, *op. cit., supra,* at 574. Therefore, one of the factors the court considered was the fact that the events causing the alleged excitement of the declarant (the officers having discovered the contraband in the trunk) was not the subject matter of the statement, which concernted the previous event of the bag's being placed in the trunk. As has been stated:

> " 'It should be kept in mind that as soon as the excited utterance goes beyond description of the exciting event and deals with past facts or with the future it may tend to take on a reflective quality and must be more carefully scrutinized with respect to the second element, that of true spontaneity. In other words, the very fact that the utterance is not descriptive of the exciting event is one of the factors which the trial court must take into account

in the evaluation of whether the statement is truly a spontaneous, impulsive expression excited by the event.'

* * *

". . . the relationship of the statement to the startling occasion may properly be taken into account as one of the many factors which bear upon the question whether the utterance satisfies the true requirements of the exception, which are that there be an occasion which startles the declarant and that the utterance express the declarant's spontaneous reaction to the occasion." Louisell & Mueller, *Federal Evidence*, pp. 514-515, quoting *Murphy Auto Parts Co.* v. *Ball*, 249 F.2d 508, 509-11 (D.C. Cir. 1957), *cert. den.* 355 U.S. 932.

An additional factor considered by this court was that from the time the officers had knocked on the trailer door and indicated their intention to take possession of the rented automobile on behalf of its owner, the defendant-declarant had approximately an hour and-a-half during which he would have known that it was extremely likely that the contraband would be discovered somewhere in the course of events. This opportunity to reflect and fabricate an explanation also detracts from the trustworthiness of the excited utterance, which is the element that forms the primary reason for making such utterances hearsay exceptions. 4 Weinstein, *Evidence* ¶803(2)(01) at 803-84 n. 24 (1981). That the opportunity to reflect occurred before rather than after the alleged exciting event is not determinative.

This court also took into consideration that the Rule 104(a) inquiry revealed that the officer on whose testimony the proponent of the evidence relied to establish the statement as an excited utterance indicated considerable skepticism as to the genuine excitement of the defendant-declarant at the time of the statement. Louisell & Mueller, *op. cit., supra* at 510.

Considering all of these factors, the court determined that the proffered statement was not properly to be considered as an admission, a present sense impression or an excited ut-

terance. Therefore, the court sustained the objection and excluded the testimony.

This 13th day of October, 1983.

/s/ WILLIAM C. BERTELSMAN
JUDGE

Copies to:
D. Davidson
B. Whitman
U.S. Atty.
U.S. Prob.
10-17-83 B

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CRIMINAL NO. 83-30

UNITED STATES OF AMERICA
PLAINTIFF

VS.

DEAN ALLEN PHELPS
and CHAUNCEY TAYLOR
DEFENDANTS

ORDER

(Filed August 25, 1983)

This matter is before the court on objections to the Report and Recommendation of the United States Magistrate, Honorable Joseph M. Hood, recommending denial of a motion by the defendants to suppress the results of an alleged search.

Upon careful consideration of the record and a reading of the transcript, the court is of the opinion that the objections are not well taken and must be overruled. The court will adopt the findings of fact and conclusions of law of the Magistrate in making this ruling and also make the following observations and additional findings:

1. The defendants' approach to this matter is overly complicated. In the opinion of the court, the transcript reflects clearly that the police officers were fully justified in taking possession of the automobile at the request of Budget Rent-a-Car, its owner. They were informed by Budget that the car was overdue and were instructed by Budget to take it into custody on its behalf.

2. The court regards the issues of a *Terry* stop, an inventory upon an arrest, and a forced consent, as being false and unnecessary issues. In the view of the court, when Budget instructed the officers to take the car into its possession, they were justified in terminating the possession of the car by the defendants. The transition of the car from the possession of the defendnats to the possession of the officers (as agents of Budget) was completed upon transfer of the keys. The officers were then in lawful possession of the vehicle and fully justified in looking through it to be sure the defendants had left no personal effects. It is probably correct to say that the defendants' expectation of privacy in the vehicle terminated, or that they had no standing to complain of a wrongful search, but the court views such statements as unnecessary to the simple situation at hand.

3. It is unnecessary for the court to analyze whether the defendants consented to the search, or whether if they did it was coerced. The officers were fully justified in taking possession of the vehicle, and when they did they were the lawful custodians thereof. The defendants had no more expectation of privacy in the vehicle after the officers took it over than a tenant who has moved out of an apartment, or a borrower who has returned a book to the library.

4. The defendants misconstrue the situation when they state that the magistrate or court, or indeed the officers, took the position that their expectation of privacy had terminated when the car became overdue. This is not the view of the officers at the time, and it is not the view of the court now. Rather, when instructed by the owner of the car to secure it on its behalf, the officers became the rightful possessors and were under an obligation to look through the vehicle and return any personal effects of the defendants. When the keys were returned, the owner of the vehicle became its possessor and the officers were the owner's representatives or agents. It was at that point (the transition occurring at the surrender of the keys) that the expectation of privacy ceased.

Therefore, the court being advised,

IT IS ORDERED as follows:

1. That the objections to the Report and Recommendation of the Magistrate be, and they are, hereby overruled.

2. That the motion to suppress of the defendants be, and it is, hereby denied.

3. That the Findings of Fact and Conclusions of Law of the Report and Recommendation be, and they are, hereby adopted by the court, with the additions set forth above.

4. That Chauncey Taylor's objections to the Magistrate's Report and Recommendation on his motion to sever be, and hereby are, overruled and that the Magistrate's findings of fact and conclusions of law on the motion to sever are hereby adopted.

5. That the other motions made by the defendants also be denied, no objections have been filed to the Magistrate's recommended rulings on them.

This 25th day of August, 1983.

/s/ WILLIAM C. BERTELSMAN
JUDGE

8-26-83 MG.
U.S. Atty.
B. Whitman
D. Davidson

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
— COVINGTON

CRIMINAL NO. 83-30

UNITED STATES OF AMERICA,
PLAINTIFF,

VS.

DEAN ALLEN PHELPS
and CHAUNCEY TAYLOR,
DEFENDANTS.

MAGISTRATE'S REPORT AND RECOMMENDATION

(Filed July 28, 1983)

In the above-styled two-count indictment, Dean Allen Phelps and Chauncey Taylor are charged with possessing with intent to distribute 169 pounds of marijuana and 1½ pounds of cocaine in violation of 21 U.S.C. § 841(a)(1). Defendants have jointly moved to suppress the cocaine and marijuana they are alleged to have had in their possession. After an evidentiary hearing, the matter is ready for a report and recommendation as to the appropriate disposition of the motion *sub judice*. 28 U.S.C. § 636(b)(1)(B).

On January 25, 1983, two Kenton County Deputy Sheriffs — Captain Tom Collins and Deputy Pat Crowley — were stationed on Carew Drive in Crescent Springs, Kentucky, to serve several warrants on an individual expected to arrive at a house-trailer at 2415 Carew Drive. While waiting, they observed at 11:30 A.M. a black over silver Lincoln Continental pull into the parking lot, hesitate momentarily, its oc-

cupants look at each other, and then park across the street from a mobile home located at 2336 Carew Drive. The occupants of the Lincoln were seen to gather some personal effects, alight from the car, and then enter the mobile home at 2336 Carew Drive.

Shortly thereafter, while disposing of trash from his lunch, Captain Collins noticed some writing on the Florida license plate of the Lincoln. His curiosity aroused, Captain Collins contacted the Kenton County Police Department and asked them to conduct a license check. He was later informed that the vehicle was registered to Budget Rent-a-car of Orlando, Florida and had not been reported stolen. Still concerned, Captain Collins asked the dispatcher to telephone the local Budget Rent-a-car office regarding the vehicle's status. The local office ascertained that the Lincoln, rented to Gregory P. Lake, was to have been returned in Orlando on January 22, 1983, and was to have been driven only in the State of Florida. Dave Clark of the Orlando office of Budget Rent-a-car verified this information and asked the local police to seize the vehicle. Clark was informed that this would not be possible without notice from Florida police authorities that the Lincoln had been reported stolen.

In the meantime, Captain Collins and Deputy Crawley continued their surveillance. Finally, after consulting with Detective Jack Denham of the Kenton County Commonwealth's Attorney's office, the two decided at approximately 2:45 P.M. to approach the trailer in hope of eliciting some information regarding the Lincoln from the two men seen leaving it. Phelps answered the door. After being informed of the purpose for their visit, Phelps asked the two officers to come inside. Captain Collins provided *Miranda* warnings, but advised Phelps and Taylor they were not under arrest. According to Captain Collins, Phelps expressed surprise that the automobile had been reported overdue, claiming that he renewed the rental agreement. He advised that he could clarify the situation with a few telephone calls to Florida. Captain Collins, hoping the situation could be resolved without impounding the vehicle unnecessarily, agreed to take

no action along that line until Phelps had endeavored to do so. Eventually, at 3:59 P.M., after having been informed that the car had been reported stolen, after ascertaining from the rental agreement that the automobile was to be driven only in Florida and was overdue, and after being requested by the Orange County, Florida Sheriff's office to do so, Captain Collins decided to impound the vehicle and called for a wrecker.

At this time, Phelps and Taylor were given the opportunity to retrieve their personal effects from the Lincoln. After they had obtained some items from the passenger compartment, Chief Al Webster of the Dixie Police Authority, who had been called in to assist the deputy sheriffs, asked Phelps if he wished to check the trunk of the vehicle. When Phelps told him the trunk was clean, Webster suggested that he check it to make sure. Phelps then handed or tossed the keys to Webster who then opened the trunk.

As soon as the trunk was opened, Captain Collins detected the distinctive odor of marijuana which he believed was emanating from light cardboard boxes observed therein. When Chief Webster opened the boxes, each was found to contain marijuana. Captain Collins then called for assistance from a narcotics officer.

Detective Hal Spaw of the Northern Kentucky Narcotics Unit responded to the call for assistance. he opened a brown satchel found in the trunk and ascertained that it contained a locked green bank bag. He obtained the key to the bag from Phelps, opened it and found cocaine.

The first principle of Fourth Amendment jurisprudence is that the police must, wherever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure. *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968). This procedure, predicated upon a showing of probable cause to believe that incriminating evidence is located in a particular place, *see Zurcher* v. *Stanford Daily*, 436 U.S. 547, 558 (1978), is designed to minimize unreasonable assertions of executive authority. *Arkansas* v. *Sanders*, 442 U.S. 758, 760 (1979). Subject only to few specifically established and well delineated exceptions, searches conducted outside the war-

rant process are *per se* unreasonable. *Katz* v. *United States*, 389 U.S. 347, 357 (1967).

Defendants contend that the warrantless search of the trunk of the Lincoln Continental, the light boxes and the satchel does not fit within one of the few specifically established and well delineated exceptions. Hence, it is asserted that the search was conducted in violation of the Fourth Amendment.[1]

The United States first contends defendants lack standing to contest the warrantless search which produced the incriminating evidence. Conceding that both Phelps and Taylor were permitted to drive the car under the rental agreement, the government argues that their breach of that agreement constituted a conversion of the vehicle. *United States* v. *Wilson*, 588 F.2d 688, 690 (5th Cir. 1973). As a result, it is asserted that defendants lost their legitimate expectation of privacy in the automobile in their possession. *United States* v. *Hensel*, 672 F.2d 578, 579 (6th Cir. 1982); *United States* v. *Hargrove*, 674 F.2d 411, 413 (4th Cir. 1981); *cf. United States* v. *Sanchez*, 635 F.2d 47, 63-64 (2d Cir. 1980).

Although the rental agreement listing defendants as authorized drivers of the vehicle was introduced into evidence, Government's Exhibit #1, that same agreement reflects, as mentioned above, the vehicle was both overdue and outside the permitted area. Moreover, before the automobile was impounded, the Kentucky police had received a report that it had been reported stolen. Even though defendants once had a legitimate expectation of privacy in the leased vehicle, that expectation evaporated with the breach of the lease conditions. At that point, they were no longer in possession of the car with the permission of the lawful owner. Indeed, under the terms of the agreement, the owner was en-

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[1] Defendants suggested at the hearing that the burden of going forward should be placed on the government since it was conceded that the police conducted a warrantless search. However, it is clear that proponents of a motion to suppress have the burden of proving that their own Fourth Amendment rights were violated by the challenged search and seizure. *See Simmons* v. *United States*, 390 U.S. 377, 389-90 (1968).

titled to immediately repossess the automobile without demand if not returned timely. Under *Rakas* v. *Illinois*, 439 U.S. 128, 143-44 N. 12 (1978), defendants lack standing to contest the allegedly unreasonable search of the rented Lincoln Continental. *United States* v. *Hensel, supra* at 579. The motion to suppress should be denied.

Assuming, *arguendo*, that defendants have standing to contest the search, in evaluating the validity of a officer's investigative conduct, the touchstone of the Court's analysis is always the reasonableness of the particular governmental intrusion of a citizen's personal security. *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108-09 (1977); *Michigan* v. *Long*, ____ U.S. ____, 33 Cr L 3317, 3322 (No. 82-256, July 6, 1983). For the reasons which follow, I do not believe the Kentucky police officers acted unreasonably in this instance.

Once the Kentucky police officers determined they were required under the facts before them to impound the automobile, they could have secured and inventoried its contents without offending the Fourth Amendment's proscription regarding unreasonable search and seizures. *South Dakota* v. *Opperman*, 428 U.S. 364, 372-76 (1976). However, the evidence offered at the hearing clearly establishes that the Kentucky police made no attempt to secure and inventory the contents of the automobile. Rather, as Captain Collins explained, since defendants were not being detained on any charges, they were permitted to remove their personal property from the vehicle, a perfectly permissible practice under the more stringent Kentucky Constitution. *See Wagner* v. *Commonwealth*, Ky., 581 S.W.2d 352, 356-57 (1979). While defendants were removing their personal items, Chief Webster suggested that Phelps check the automobile's trunk. Phelps, according to the uncontroverted testimony of Chief Webster and Captain Collins, responded to this suggestion by handing the key to the trunk to Chief Webster who opened it — an act which eventually produced the contraband which is the subject of this action.

Once the trunk was lawfully opened and the strong odor of marijuana was detected, *see United States* v. *Norman*, 701

F.2d 295, 297 (4th Cir. 1983), the plain view exception to the warrant requirement justified or permitted the officers to search the cardboard boxes. *Collidge* v. *New Hampshire*, 403 U.S. 443 (1971); *United States* v. *Gravier*, 706 F.2d 174, 177 (6th Cir. 1983). The Kentucky police officers were lawfully present, the boxes were in plain view and the incriminating nature of their contents was immediately apparent. *Texas* v. *Brown*, ____ U.S. ____, 33 Cr L 3001, 3003-05 (No. 81-419, April 19, 1983); *United States* v. *Gravier*, *supra* at 177. Furthermore, once the marijuana was discovered, the police had probable cause to conduct a search of the entire vehicle, including all other containers, without offending the Fourth Amendment. *United States* v. *Ross*, 456 U.S. 798 (1982). Hence the discovery of the cocaine in the locked green bank bag was not tainted either.

Accordingly, it is recommended that defendants' motion to suppress be denied for lack of standing or, in the alternative, for lack of merit.

Objections to this Report and Recommendation must be filed within ten (10) days of the date of service of the same or further appeal is waived. *United States* v. *Walters*, 638 F.2d 947 (6th Cir. 1983).

This the 28th day of July, 1983.

/s/ JOSEPH M. HOOD
UNITED STATES MAGISTRATE

Copies:
U.S. Attorney
Hon. David Davidson
Hon. Bruce Whitman
7-28-83

APPENDIX G

EXHIBIT 1

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, AND FOR ORANGE COUNTY, FLORIDA

CASE NO. CR. 84-1703

STATE OF FLORIDA,

Plaintiff,

vs.

ROY EDWARD LEINSTER,

Defendant.

ORDER WITHHOLDING ADJUDICATION OF GUILT AND PLACING DEFENDANT ON PROBATION

(Filed September 14, 1984)

THIS CAUSE coming on this day to be heard before me, and you, the Defendant, Roy Edward Leinster being now present before me, and you having:
ENTERED A PLEA OF GUILTY TO
the offense(s) of CT I POSSESSION OF COCAINE A CONTROLLED SUBSTANCE *

It appearing to the satisfaction of the Court that you are not likely again to engage in a criminal course of conduct, and that the ends of justice and the welfare of society do not require that you should presently be adjudged guilty and suffer the penalty authorized by law;

Now. therefore, it is ORDERED that the adjudication of guilt and imposition of sentence are hereby withheld and that you are hereby placed on probation for a period of FOUR (4)

YEARS under the supervision of the Department of Corrections and its officers, such supervision to be subject to the provisions of the laws of this State.
* TO82-63423: appeal dismissed sentence to commence 9-4-84.

It is further ORDERED that you shall comply with the following general conditions of probation together with any special conditions which are designated on the reverse hereof:

(1) Not later than the fifth day of each month, you will make a full and truthful report to your Probation Officer on the form provided for that purpose.
(2) You will propmtly and truthfully answer all inquiries directed to you by the Court or your Probation Officer. You will allow the Officer to visit in your home, at your employment site, or elsewhere. You will comply with all instructions the Officer may give you.
(3) You will not change your residence or employment without first obtaining the consent of your Probation Officer. If evicted or terminated, you will notify the Officer within 72 hours of same.
(4) You will not leave the area comprised of the county of your residence and adjoining counties without first obtaining the consent of your Probation Officer.
(5) You will work faithfully at suitable employment insofar as possible and support any legal dependents to the best of your ability.
(6) You will not violate any federal, state, county or city penal law. If you are arrested or given notice to appear or citation you will notify your Probation Officer within 48 hours.
(7) You will not knowingly associate with any person engaged in criminal activity.
(8) You will not own or possess any weapon or firearms.
(9) You will not possess or use any marijuana or other controlled substance except upon prescription of a duly licensed medical or osteopathic doctor and then

only in accordance with the prescribed dosage. You will not possess any controlled substance paraphernalia or forged or blank prescription form.

(10) Unless prohibited from counsuming alcoholic beverages by a special condition elsewhere in this order you will not consume alcoholic beverages to the extent that your normal faculties are impaired.

(11) You will submit to a reasonable search without a warrant by the Probation Officer of your personal effects, residence or business premises or vehicle for alcoholic beverages, controlled substances, weapons or firearms. You will submit to chemical tests (breath, urine or blood) upon request of your Probation Officer to determine the presence and quantity of alcohol or controlled substances in your blood.

(12) You will pay to the Clerk of this Court in cash or by money order the sum of $15.00 for the Crime Compensation Trust Fund pursuant to F. S. 960.20 within _____. Case number must accompany payment.

(13) You shall pay to the Division of Corrections the sum of $20.00 per month by the fifth day of each month to defray cost of your supervision unless otherwise waived in compliance with the Florida Statutes.

(14) The Court retains jurisdiction to place you in the Probation and Restitution Center upon recommendation of your Probation Officer without a finding of violation of probation.

You are hereby placed on notice that the Court may at any time rescind or modify any of the conditions of your probation, or may extend the period of probation as authorized by law, or may discharge you from further supervision; and that if you violate any of the conditions of your probation, you may be arrested and the Court may revoke your probation and impose any sentence which it might have imposed before placing you on probation.

It is further ORDERED that the Clerk of this Court file

this order in his office, record the same in the Minutes of the Court, and forthwith provide certified copies of same to the Probation Officer for his use in compliance with the requirements of law.

DONE AND ORDERED IN OPEN COURT this 4th day of September, 1984.

/s/ _____
JUDGE

* * *